

PANEL III

CONGRESS, THE COURT, AND THE BILL OF RIGHTS

FRANK H. EASTERBROOK*

Our bifurcated panel this morning will discuss Congress' power and duty to construe and to enforce the Constitution. The first pair of speakers, Jonathan Macey and Virginia Seitz, will discuss the differences between economic and non-economic freedoms, and our second pair of speakers, Gary Lawson and Walter Dellinger, will discuss Congress' powers under Section 5 of the Fourteenth Amendment.

The Federalist Society allows the moderator the small liberty of saying a few words to get the panel going. I thought that I would motivate the first of these topics, the difference between noneconomic and economic liberties, by reading an excerpt from an under-appreciated article by someone who, until this year, has been under-appreciated by the public. The man's name is Ronald Coase. He is famous now for having won the Nobel Prize in Economics this year and for having written the article, *The Problem of Social Cost*,¹ which began in a serious way the discipline of economic analysis of law.

These are certainly not the only achievements in Professor Coase's long career. He wrote an article in 1977 with the highly misleading title, *Advertising and Free Speech*.² The title is highly misleading because the article has little to do with advertising but everything to do with the difference between speech, a noneconomic liberty, and other economic liberties. Listen to what Coase had to say:

Belief in free speech is embodied in the First Amendment: "Congress shall make no law . . . abridging the freedom of speech or of the press The clear purpose of the First Amendment is to limit severely the power of the government to regulate what has been termed the market for ideas—broadly speaking, what is written or spoken. In words that have often been quoted, and with approval, Justice Holmes described the fundamental belief which finds its expression in the First Amendment. It is that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the

* Moderator. Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, The University of Chicago Law School.

¹ Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

² Ronald Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1 (1977).

power of the thought to get itself accepted in the competition of the market." A statement such as this displays an extreme faith in the efficiency of competitive markets and a profound distrust of government regulation. The First Amendment prohibitions on government action have received, and continue to receive, the strongest support from the intellectual community.

This same intellectual community has, of course, in general been very anxious that the government should extensively regulate activities not covered by the First Amendment and rarely a day passes without new proposals for further regulation. This striking difference in the policies espoused when dealing with speech or written material, which I will refer to for shortness as the market for ideas, and those which are thought appropriate for the ordinary market for goods and services is clearly something which calls for an explanation. It is not easy to find.

In the market for ideas, consumers are assumed to be able to choose appropriately between what they are offered without serious difficulty. As Milton said (and this has been repeated many times since) "Let [truth] and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?" But in the market for goods, we do not seem to believe that consumers are able to make such a fine discrimination and it is deemed necessary to regulate producers with regard to what they tell consumers, how goods are to be labelled and described, and so on, lest consumers make the wrong choices. It is perhaps merely an extension of this assumption about consumer behavior in the two markets that whereas in the market for goods, producers are thought to be unscrupulous in their dealings, in the market for ideas fraud is not treated as a serious problem—which is at least consistent, since in a market in which consumers effortlessly detect false claims, what motive could there be for politicians, journalists or authors to attempt to make false or misleading statements?

But perhaps even more extraordinary is the difference in the view held about the government and its competence and motivation. I assume that support for the First Amendment prohibitions on government action—and the support is widespread—is based on beliefs about what the effects would be if the government intervened in the market for ideas. It seems to be believed that the government would be inefficient and wrongly motivated, that it would suppress ideas that should be put into circulation and would encourage those to circulate which we would be better without. How different is the government assumed to be when we come to economic regulation. In this area government is considered to be competent in action and pure in motivation so that it is desirable that it should engage in the regulation, in the minutest detail, of the goods and services which people buy, the terms on which they buy, the price which they can pay, from whom they should be allowed to buy, and so

on. Since we are concerned with the activities in these two different markets of the same government, why is it that it is regarded as incompetent and untrustworthy in the one market and efficient and reliable in the other?³

Professor Coase goes on to give an extended answer to that question. He concludes that there is no difference in the competence and reliability of the government in those two markets—that the government is incompetent and unreliable in both.

I have brought Coase to mind merely to set the stage for our first two speakers. I am confident that they will have views somewhat different from those expressed by Professor Coase.

JONATHAN R. MACEY*

I am pleased to be here today to speak about the difference between economic and noneconomic rights. However, as long as we have someone on our panel as talented and as interesting as Frank Easterbrook, I would like to say something that will hopefully re-engage him in the discussion during the question and answer period. During both his opening remarks and his invocation of Ronald Coase's views about the shifting and perhaps nonexistent distinction between economic rights and noneconomic rights, my mind went to one of Judge Easterbrook's articles called *The Constitution of Business*, which was published a few years ago in connection with a Federalist Society symposium and which includes some comments about substantive due process. Substantive due process, of course, is the Supreme Court doctrine of the 1930s that provided a set of constitutional protections for economic liberties such as the freedom of contract. I just happen to have Judge Easterbrook's article with me and would like to read an excerpt from that article:

Substantive due process is dead, we buried it in 1937. The Supreme Court then held that Congress and the states may regulate the business as they please. No more claims that the Contract Clause gave bankers the liberty to work for a pittance or mine operators the privilege to sign workers to yellow dog contracts. Scarcely anyone mourns the absence. All know, then,

³ *Id.* at 1-2 (citations omitted).

* Professor of Law, Cornell Law School.

there are good and bad reasons to regulate business. Which is which has been left to political actors. The regulation of personal liberties would receive close attention after 1937, the regulation of economic activity would receive none.¹

So far, this excerpt is just an uncontroversial depiction of the current status of constitutional jurisprudence. Judge Easterbrook then says—and here is the controversial part about which I would like to challenge him and my co-panelist, Ms. Seitz—that "you may praise or regret this state of affairs. I happen to think that it is fine."² I hope that Judge Easterbrook's introductory remarks suggest a recantation of those views, but perhaps not. In any event, that issue is now on the table for more detailed discussion later.

The first question that I want to address this morning is a very basic question that, as I continue to study public choice and constitutional law, strikes me as something that is very poorly understood. That question involves the proper definition of "rights." Before we can understand or can even begin an inquiry into the distinction between economic liberty and noneconomic liberty, we must have some idea of what rights are. I want to at least try to come up with a definition upon which we can all agree. While such an attempt is not an easy task at a Federalist Society convention, the task is perhaps easier than creating a definition upon which everyone universally could agree. I would suggest that if the term "rights" means anything, it means a sphere of activity that we are privileged to enjoy without the fear of intrusion. This definition of "rights," I would suggest, creates a dual responsibility for government. The first responsibility for government is to operate so as not to interfere in that area of activity that has been carved out as existing within the sphere of rights. The second responsibility that this definition of "rights" creates for government is to protect those rights. If I sign a contract with one of you in this room to perform something and if I do not perform my end of the bargain, we all know that you can take me to court to seek vindication of your rights. Therefore, the government should act as a mechanism that not only does not

¹ Frank H. Easterbrook, *The Constitution of Business*, GEO. MASON U. L. REV., Winter 1988, at 53.

² *Id.* at 54.

intrude on people's rights but also actually enforces those rights.

Obviously, people can disagree about what kinds of things fall within the sphere of rights that I have just defined. Clearly, people who argue on both sides of the abortion issue or any other issue have different conceptions of what falls within and without that sphere of rights. However, I would suggest that my definition of "rights" still adds something to our stock of knowledge. A mere look at the Supreme Court's jurisprudence on voting rights reveals that the Court has grappled for decades with the issue of how to treat governmental efforts to deal with voting rights, such as residency requirements and polling rules. As a ritualistic incantation in its voting rights opinions, the Court says that voting is a fundamental right because it is necessary to protect all other rights. In my view, that description by the Court explains how poorly we understand the idea of rights; if something really is a right, then one does not need voting to protect it. For example, if one has the right to contract with another, then one has the right to engage in that activity without fear of governmental interference. If one has the right to assemble, then Congress, by virtue of interest-group pressure, majoritarian will, or any other reason, cannot decide to deprive anyone of that right. If Congress possesses such a deprivation power, then the right to assemble is not really a right in the first place.

One of the objectives of this panel is to address Congress' duty to avoid incursions upon property rights. If we view property ownership as a right, then the question that this panel is charged with addressing is admittedly self-responsive. Beyond this admission, I have several important things to add about the issue of rights. As far as Congress' responsibility to protect people's rights from governmental intrusion, I believe that the Framers did not trust human instinct or judgment very much. Admittedly, this view is itself a ritualistic incantation at these Federalist Society events, but it is a view always worth repeating. The Framers planned to protect rights by creating a constitutional structure of checks and balances along with other various provisions of federalism. These provisions would operate together so that, after the period of constitutional creation, the system would protect rights through a rule of law and a constitutional structure.

Two reasons support the creation of these constitutional provisions. First, as detailed in *The Federalist No. 10*,³ enlightened statesmen will not always be at the helm; therefore, we cannot trust the ordinary political process to the vagaries of shifting public opinion. In fact, we really need a system that will operate to counter the excesses of faction. A second reason, which forces us to directly confront the distinction between economic and noneconomic rights, is one that is not given as much attention as I think it deserves. Every time that an interest group, an individual, or even a virtuous uprising of the people attempts to exert its own vision of the good on everyone else, no matter how benign or well-intentioned, that attempt forces those of us who are opposed to this effort to galvanize into an effective political coalition in order to check that thrust or parry. The problem is that some of us, as a matter of human preference, prefer not to spend our time engaged in political battles or engaged in the political process. My definition of "rights" is useful because it deals with a situation that I think may apply to a lot of Americans—Richard Nixon described them as the "silent majority"—who are disengaged from the political process entirely or almost entirely. These people live in rural regions, such as upstate New York, and do not like coming to Washington very much, preferring a bucolic, pastoral lifestyle. I would call this a right to prefer other things to politics, be it family, reading, parcheesi, or even MTV. I would elevate this preference right to the status of any other right. This right to live a private life of enterprise, disengaged from the political process, is gravely endangered when everything is put on the table and when individuals cannot rely solely on the Constitution to protect their rights.

I would now like to talk about the arguments in favor of elevating economic rights to a more dignified constitutional status. Certainly, noneconomic rights, such as freedom of speech, freedom of religion, freedom of the press, and freedom of peaceable assembly, are very significant. The most common reason offered for the elevation of these noneconomic rights to special dignity is that, as economists would say, positive externalities are associated with these rights. However, I would suggest that the same can be said of

³ THE FEDERALIST NO. 10 (James Madison).

economic rights.

As a basic principle of economics, when people form contracts, the positions of parties to those contracts are improved in ways that are easy to specify. In fact, these ways are far easier to specify than are the ways that people's positions are improved by, say, the right to engage in pornography or the right to other forms of free speech. In other words, for a variety of reasons as catalogued in my article entitled *Some Causes and Consequences of the Bifurcated Treatment of Economic Rights and "Other" Rights Under the United States Constitution*,³ I would suggest that a strong argument can be made that economic rights are as worthy of protection as noneconomic rights. Economic rights are a particularly fragile sort of right because of the incentive of politically motivated actors to go to the political process for the purpose of obtaining wealth transfers. Economic rights are also particularly important because they are the only rights that allow people to exercise the parallel right of being able to disengage themselves from the political process if they so choose. Finally, economic rights are the only rights that, when exercised, have meaningful costs for the economic actor. When I exercise my economic right to buy a piece of property, to make an investment, or to enter into and to bind myself by a contract, I directly suffer the economic consequences of that action. In fact, I suffer the consequences to a far greater extent than I do when I engage in noneconomic activities like free speech or even voting in a large democracy in which the probability of my particular vote affecting the outcome is, if not zero, very close to zero.

For all the reasons that I have discussed this morning, I would suggest that we re-examine that Supreme Court term of 1937 and maybe give some serious thought to the idea of carving out a sphere of economic rights. Thank you.

VIRGINIA A. SEITZ*

Good morning. I am a member of this panel because I am one of the attorneys representing the AFL-CIO in several cases

³ Jonathan R. Macey, *Some Causes and Consequences of the Bifurcated Treatment of Economic Rights and "Other" Rights Under the United States Constitution*, 9 SOC. PHIL. & POL'Y 141 (1992).

* Attorney, Bredhoff & Kaiser, Washington, D.C.

involving individual economic rights before the Supreme Court this term: *General Motors Corp. v. Romein*,¹ in which the Contract Clause is at issue, and *Yee v. City of Escondido*² and *Lucas v. South Carolina Coastal Council*,³ in which the Takings Clause is at issue.

The first point that I would like to make is that the Supreme Court's treatment of economic and noneconomic constitutional rights is seemingly on the threshold of change. This development is not something about which a union lawyer would necessarily be happy or unhappy. Problems often arise when individual noneconomic rights are given preference while one is trying to represent the interests of a group. Therefore, for the labor movement, heightened scrutiny of individual noneconomic rights has not always been a benefit. In any event, we see that this framework is about to be significantly altered. The interesting question is how the order will change, and the answer to this question will depend on which of two schools of conservative thought prevail.

During all the years that conservatives spent in the wilderness, they were perceived as espousing a theory that rejected only half of the post-*Lochner*⁴ order. Many conservatives, including Justice Scalia and Judge Bork, expressed agreement with the Court's rejection of *Lochner* and espoused the view that judicial action on behalf of individual economic rights, including the particular version of economic rights inherent in laissez-faire capitalism, is antidemocratic. However, this group of conservatives rejected the other half of the post-*Lochner* order—the excessive, in their view, protection of individual rights. This school of conservative thought believed that judicial restraint was in order no matter what the nature of the constitutional right at issue and that liberal, activist judges were acting wrongly, not because their decisions were unpopular with conservatives, but because such activism was antidemocratic.

A second strain of conservative thought is offered by those who never bought the argument for judicial passivity. These

¹ 112 S. Ct. 1105 (1992).

² 112 S. Ct. 1522 (1992).

³ 112 S. Ct. 2886 (1992).

⁴ *Lochner v. New York*, 198 U.S. 45 (1905).

conservatives, most prominently Professors Epstein and Siegan, make the case for increased judicial activism on behalf of individual economic rights as they conceive of such rights. This group's notions of contractual freedom and property rights are based on its interpretation of the intent of the Framers, America's libertarian traditions, the common law of the eighteenth century, and on so-called empirical evidence demonstrating that government regulation of the economy is harmful to consumers, owners, and workers.

A vigorous debate is presently occurring among conservatives. These conservatives favor either judicial restraint, a position comfortable and compelling when the Court was once dominated by liberals, or a renewed, judicial activism on behalf of individual economic rights, a position more attractive now that conservative judges dominate and will continue to dominate the Court for some years. I will readily admit that this tension between principle and power is hardly unique to any particular political position. I work with many liberals who are now hoisting the banners of precedent and restraint, but who all favored judicial activism when the reins were in their hands.

For me, the most interesting question is which school of conservative thought will prevail. I believe that the tension that exists among conservative groups and within individual conservatives is reflected in the Supreme Court's docket and in its handling of the cases that I mentioned earlier. In my view, petitions for certiorari were granted in *General Motors*, *Yee*, and *Lucas*, because some Justices viewed these cases as opportunities to breathe new life into the Contract Clause and into the Takings Clause. Arguments from these perspectives intrigued the Court and resulted in the granting of the petitions for certiorari in these cases. However, after *General Motors* was briefed and the original intent of the Framers thoroughly argued and examined by both sides, the Court simply determined that the Michigan act at issue did not create a contract protected by the Contract Clause. Likewise, the Court in *Yee* held that the regulations at issue did not cause a physical taking and never reached the far more interesting and complicated regulatory takings question. The oral argument in *Lucas* has suggested that the Court's decision may be rooted in ripeness grounds.

I am not saying that the Court has not had legitimate, prudential reasons to avoid taking the plunge and asserting a new approach to individual economic rights. I am saying that the tension within conservative thought between generalized judicial restraint and judicial activism on behalf of individual economic rights has made the Court's willingness to bite the bullet more problematic.

I also believe that this tension will have a second significant consequence. I predict that any enhanced protection of individual economic rights will not raise such rights to the current elevated status of noneconomic constitutional rights but will instead manifest itself in a heightened means-ends scrutiny, akin to that which Justice Scalia utilized in *Nollan v. California Coastal Commission*.⁵ While alarmist liberals, such as myself, will argue that this approach is the equivalent to a return to *Lochner*, in many cases we will be wrong. A substantial difference between heightened means-ends scrutiny and judicial review of the appropriateness of the ends of economic legislation does exist in theory and clearly should exist in practice.

In a less controversial vein, I also predict that the Court in the future will give somewhat more deference to government regulation that is said to impinge on noneconomic constitutional rights. The practical consequence of both of my predictions is that the levels of protection accorded to economic and noneconomic constitutional rights will draw somewhat closer together, but that diminished differential treatment will not disappear beneath a wave of conservative jurists. The distinction will remain, in part due to inertia, in part because good reasons exist for its continuance, and in part because many of the arguments against the dichotomy are without merit.

I always feel that the deck is somewhat stacked against me when I discuss, with the disciples of the law and economics school or with public choice theorists, whether noneconomic constitutional rights should be favored over economic rights. Individuals who believe that the world is best described as a struggle for control over material resources and that the world is best served when the market is left relatively unfettered

⁵ 483 U.S. 825 (1987).

naturally believe that economic rights protected by the Constitution are of central importance and have been undervalued by the Court. Leaving this aside, I believe, as Professor Macey states, that economic rights and freedoms, such as property rights, have played a critical role in securing the other noneconomic rights upon which some individuals, like myself, place a higher value. Some security in property allows individuals to feel protected from the power of others, to express themselves, and to feel more in control of their lives.

The critical question is how much economic liberty is necessary to secure these other noneconomic rights? The answer to this question is neither self-evident nor simple. Because economic rights, such as property and contract rights, are defined by government in the first instance, these rights cannot exist without government interference with economic liberty. What is meant by "economic liberty?" Is economic liberty the freedom to monopolize or the freedom to sell people things that are bad for them, such as cocaine? What types of transactions are permissible and what techniques of bargaining are permissible within permissible transactions? Is fraud permissible? Society first must define "economic liberty" by collectively deciding what goods are entitled to the status of secured entitlement. Society must provide a set of baselines. Once we agree, as we all do, that some limits are necessary, we must make a collective judgment about where to stop. The justification for protecting economic rights, such as property, is that these rights allow people to effectively exercise their noneconomic rights, and that the free exercise of such rights will create the optimal nation. If one assumes that secure possession of some property is prerequisite to the effective exercise of noneconomic freedoms, then what becomes of those who are free but who do not possess or are unable to accumulate property because they have no skills and no assets? These individuals are indeed in a poor position to exercise their other rights. Perhaps the fact that economic rights are so important may be used to justify some redistribution of these rights to assure that all people have some minimum level of assets so that they are truly able to exercise their noneconomic rights.

I do not know exactly how much economic liberty is essential to the preservation of other liberties that I consider more fundamental, but I am not persuaded that the required

amount of economic liberty is the same as was present in eighteenth-century America. Property and contract rights have been redefined in many different ways since the founding, most notably in the eighteenth century when significant changes occurred to make the Industrial Revolution possible. Unless one is an originalist, which I am not and which is yet another critical debate, I see little reason to want judges to decide which school of economists—preregulation or anti-regulation—is correct.

To this point, I have made an argument for judicial restraint only with respect to economic rights. Why should we have heightened judicial scrutiny of governmental regulation of noneconomic rights? I have at times been a supporter of the process theorists, such as Professor Ely, who argue that a preference for enhanced scrutiny is justified for those rights that ensure the integrity of the political process narrowly defined. This distinction is helpful but is not fully explanatory of the Court's decisions. I believe that the real reason for the Court's differing scrutiny of economic and noneconomic rights is a practical one. The state must regulate economic affairs, even if only minimally. Without some regulation, only a Hobbesian world with no markets, with no enforceable bargains, and with no restrictions on fraud can exist. The state must regulate conflicting private economic interests, enforcing some and disallowing others. Once the state gets into the regulatory business, the Court is unable to perceive any sensible constitutional line to draw in allowing and disallowing economic regulation and feels ill-suited to the task of evaluating conflicting claims about the merits of economic statutes. However, no comparable necessity exists for government regulation, *ab initio*, of noneconomic constitutional rights, such as freedom of speech and freedom of religion. This relative need, or lack thereof, for governmental regulation is seemingly the source of the Court's differing scrutiny of economic and noneconomic rights, but the depth of the distinction requires further elaboration.

I will conclude with a heartfelt point. Public choice theory, as set forth by Professor Macey, rests on an extraordinarily cynical premise—that, in their public lives, people are engaged solely in a scramble for resources and that all else is a facade, a cover-up for this basic reality. Let us take this premise and turn it on public choice theorists. Do public choice theorists

engage in a scramble for resources by espousing a popular theory at precisely the time that much prestige and many appointments from conservative administrations can be gained by doing so? Of course they don't. Public choice theorists take such a position because they believe that their ideas are true and that a general recognition of their truth will make the constitutional system work better for all of us, not for just a particular interest group. I hold differing beliefs for the same reason. We must take each other's ideas seriously. Human beings are complicated. We scramble for resources in public life, but we are motivated by much more. We cannot run away from this reality. We collectively believe that we are better when we act for reasons other than or in conflict with our economic self-interest, and our constitutional framework has come to reflect this collective belief. Thank you.

GARY S. LAWSON*

One of the most interesting intellectual developments of recent years is the rise of departmentalism: the view that each department of the national government has an independent and coequal obligation to interpret the Constitution.¹ According to this vision, the courts are not bound by the views of the President and Congress, and the President and Congress are not necessarily bound by the views of the courts (except, perhaps, by an obligation to obey particular judgments). This diffusion of interpretative responsibility, as with diffusion of other forms of governmental power, serves to limit the effective scope of national authority. A departmentalist federal government cannot act unless all three departments agree that the action is lawful.

In the case of Congress, that obligation to interpret the Constitution extends to all of the provisions of the Constitution that affect congressional powers, but most obviously extends to the enforcement provisions of various amendments. In particular, the obligation extends to Section 5 of the Fourteenth Amendment, which reads that Congress is empow-

* Associate Professor of Law, Northwestern University School of Law.

¹ See generally *The Federalist Society, Who Speaks for the Constitution? The Debate over Interpretive Authority* (1992).

ered "to enforce, by appropriate legislation, the provisions of this article."² My inquiry here is whether the powers of Congress under this provision to interpret the substantive provisions of the Fourteenth Amendment differ in any respect from the interpretative powers of courts.

My tentative and, for the moment, somewhat cryptic answer is that those powers of Congress are similar to those of the courts in most respects, but different in one subtle respect that is almost never discussed. Before I explain that answer, though, I want to clear up one substantive misconception about the scope of Congress' powers under Section 5 that has polluted the legal scene over the last quarter century. In the best tradition of academics, let me start with an apparent non sequitur.

Consider the Hobbs Act,³ a federal criminal statute that prohibits robbery or extortion that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce"⁴ The statute then goes on to define commerce to mean interstate or foreign commerce. The constitutional source of this statute is plainly the Commerce Clause, which empowers Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"⁵

In accordance with the principle of enumerated federal powers, the statute's source limits its potential scope. Congress has constitutional power to regulate only interstate or foreign commerce; if a robbery or an act of extortion does not involve interstate or foreign commerce, then Congress cannot regulate or punish the activity. And before you laugh at the notion of limits on Congress' Commerce Clause power in this day and age, you should know that a strangely neglected line of modern Hobbs Act cases, which includes circuit court decisions from the 1980s, squarely holds that certain extortionate

² U.S. CONST. amend. XIV, § 5. There are similar enforcement provisions in seven other amendments. *See id.* at amend. XIII, § 2; *id.* at amend. XV, § 2; *id.* at amend. XVIII, § 2; *id.* at amend. XIX, § 2; *id.* at amend. XXIII, § 2; *id.* at amend. XXIV, § 2; *id.* at amend. XXVI, § 2.

³ 18 U.S.C. § 1951 (1988).

⁴ *Id.*

⁵ U.S. CONST. art. I, § 8, cl. 3. More precisely, the statute is a law that is "necessary and proper for carrying into Execution [the commerce power]" *Id.* at art. I, § 8, cl. 18.

transactions fall outside the constitutional power of Congress to regulate under the Commerce Clause.⁶ Contrary to what you all learned in your constitutional law classes, the doctrine of enumerated powers is alive, well, and functioning, provided that you are a robber or extortionist, which is very convenient for Congress.

So suppose that a federal prosecutor tries to apply the Hobbs Act to a robbery or an extortion that does not, in fact, obstruct, delay, or affect interstate commerce. Can the government defend the prosecution by saying: "Okay, we grant that this particular transaction is not really within the government's constitutional power. But in order to assure that the government reaches all of the transactions that *are* within its power, it must pass deliberately overbroad legislation that covers an entire class of transactions. Some of those transactions will be within the government's constitutional powers, and some transactions will not. In order to cover the entire field, however, the government must legislate broadly to nail them all."

Obviously, this reasoning is not a sufficient justification for jailing the person whose conduct falls outside the scope of the Commerce Clause power. At a minimum, the government cannot *apply* an overbroad piece of legislation to someone whose conduct falls outside the scope of Congress' jurisdiction. At a maximum, the government cannot pass the statute in the first place.⁷ What could possibly be clearer or simpler than this?

⁶ See, e.g., *United States v. DiCarlantonio*, 870 F.2d 1058, 1060-61 (6th Cir.), *cert. denied*, 493 U.S. 933 (1989); *United States v. Mattson*, 671 F.2d 1020, 1023-25 (7th Cir. 1982). *But see* *United States v. Farrell*, 877 F.2d 870, 875-76 (11th Cir.), *cert. denied*, 493 U.S. 922 (1989); *United States v. Anderson*, 809 F.2d 1281, 1286 (7th Cir. 1987); *United States v. Wright*, 797 F.2d 245 (5th Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987). These holdings are clearly based on constitutional rather than statutory analysis. The Supreme Court has stated, in oft-quoted dicta, see, e.g., *Mattson*, 671 F.2d at 1023, that the Hobbs Act displays "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion . . ." *Stirone v. United States*, 361 U.S. 212, 215 (1960). A holding that a Hobbs Act prosecution fails for lack of a sufficient nexus to interstate or foreign commerce is thus necessarily a holding about the scope of the Commerce Clause, and the circuit courts that have dismissed prosecutions on this ground have readily acknowledged the constitutional foundations of their decisions.

⁷ This raises the difficult question—which need not be answered here—whether statutes must be constitutionally valid in all applications in order to be valid in any. See generally John Harrison, *The Free Exercise Clause as a Rule About Rules*, 15 HARV. J.L. & PUB. POL'Y 169 (1992).

Now consider Congress' power under Section 5 of the Fourteenth Amendment. By its terms, that enumerated power is the power to *enforce* the substantive provisions of the Fourteenth Amendment, such as Section 1.⁸ Therefore, a necessary jurisdictional predicate for the exercise of Congress' Section 5 power is an actual or potential violation of some other provision of the Fourteenth Amendment. If conduct by a state does not violate the Fourteenth Amendment, Congress' power under Section 5 simply does not reach that conduct any more than Congress' power under the Commerce Clause reaches intrastate transactions. If Congress passes overbroad legislation that purports to prohibit state action that does not, in fact, violate the Fourteenth Amendment, then, at a minimum, that legislation cannot be applied to state conduct that does not violate the Fourteenth Amendment. Once again, what could possibly be clearer or simpler than that?

As most of you know, however, a consistent line of Supreme Court cases, dating back to *Katzenbach v. Morgan*⁹ and continuing into the 1980s holds that, under Section 5, Congress can indeed prohibit state action that does not actually violate the Fourteenth Amendment. This doctrine is remarkably silly—and dangerous. For example, police have authority to enforce the criminal law, but they are not entitled to lock up innocent people in the course of punishing the guilty. By the same token, Congress is not entitled to prohibit constitutionally innocent state action in the course of remedying constitutional violations. Power to *enforce* the Fourteenth Amendment means the power to *enforce* the Fourteenth Amendment, and nothing more.

Thus, a predicate to any congressional action under Section 5 is a violation of some substantive provision of the Fourteenth Amendment. The question here is whether the interpretative authority of Congress, under Section 5, to determine when a violation of the substantive provisions of the

⁸ U.S. CONST. amend. XIV, § 1 provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

⁹ 384 U.S. 641 (1966).

Fourteenth Amendment has taken place might differ from the interpretative authority of courts.

The object of constitutional interpretation, for any political actor, is to discover the true meaning of the relevant Constitutional provisions and to act accordingly. The problem is that truths about the meaning of, for example, the Fourteenth Amendment do not have the self-evident status of principles of Aristotelian logic. Therefore, anyone who puts forward a claim about the true meaning of the amendment has to be prepared to *justify* that claim in accordance with sound epistemological principles of justification.

As a formal matter, any theory of justification has three elements, which are familiar to all lawyers. You have to know what counts as evidence for or against a proposition; you have to know how much those things count for or against your claim; and you have to know how weighty the evidence must be at the end of the process in order to justify a definitive judgment of truth or falsity. In the lingo of lawyers, you need rules of *admissibility*, rules of *significance*, and a *standard of proof*.¹⁰ These elements are familiar to anyone who has ever had to prove a fact in a court of law.

There is no reason to think that the relevant rules of admissibility and significance for interpreting the Constitution should be any different for courts and legislatures—or, for that matter, for executives. An interpretative rule of admissibility or significance is appropriate if and only if it is the best available means for determining the Constitution's objective meaning. For example, I believe that a theory of original public meaning is the correct theory of interpretation for courts, not because of some institutional feature of courts, but because originalism, properly applied, yields propositions about the constitutional text that happen to be true. Originalism performs this truth-identifying function for courts, legislatures, presidents, and citizens. In other words, admissibility and significance rules for constitutional interpretation do not depend on institutional roles or factors.

However, the third element of a theory of justification, the standard of proof, might in fact vary depending on the role of the interpreter. As lawyers, we are used to thinking about

¹⁰ See Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 867-71 (1992).

proving facts, but are not used to thinking about proving the law. Therefore, lawyers pay almost no attention to the problem of how much evidence is required to justify a claim about legal meaning. However, as I have elsewhere argued at length,¹¹ this sufficiency of the evidence question cannot be avoided.

Consider this problem in the context of Section 5. Given that a violation of the Fourteenth Amendment is a jurisdictional predicate for action under Section 5, how certain must it be that a violation of Section 1 has taken place before Congress can act? I intend here only to pose this question, not to answer it. But it is possible to imagine a plausible constitutional regime in which the answer is in fact different for different constitutional actors. A very famous 1893 article on judicial review by James Thayer suggests that courts are entitled to disregard legislation only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,— so clear that it is not open to rational question."¹² Thayer's articulation is often called the "clear statement rule" of judicial review. Under this principle, courts that are called upon to decide directly whether a state has violated Section 1—for example, in a Section 1983¹³ lawsuit—should invalidate the state action only when convinced beyond a reasonable doubt that the action is unconstitutional. This standard of proof is clearly driven by normative considerations about the appropriate institutional role of courts. But if institutional roles can be relevant in selecting a standard of proof, then whether one can or should adopt the same standard of proof for Congress under Section 5 is not at all obvious. Perhaps a Thayerian Congress can conclude under Section 5 that a state action violates the Fourteenth Amendment (or is in fact state action) merely on the basis of a preponderance of the evidence concerning constitutional meaning. This would yield a system in which Congress and the courts apply exactly the same interpretative theory—that is, the same rules of admissibility and significance—to the Fourteenth Amendment, but Congress legitimately has the authority to invalidate state laws that the courts must uphold.

¹¹ See *id.* at 861-77.

¹² James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

¹³ 42 U.S.C. § 1983 (1988).

I do not necessarily endorse Thayer's normative analysis. Indeed, I think that a case can be made that Thayer has it exactly backwards, and that courts should invalidate governmental action (or at least federal governmental action) unless the action is constitutional beyond a reasonable doubt. However, that inquiry is more or less incidental here. The trick is to start thinking, at least generally, about the problem of standards of proof for constitutional interpretation, and in particular about how those standards play out in the context of Section 5 and various institutional roles. Asking these questions is useful even if, as in my case, you do not quite have the answers yet. Thanks very much.

WALTER DELLINGER*

"In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government."¹ So wrote James Madison in *The Federalist No. 10*. Because I agree with so much of what Gary Lawson said, I want to put in a broader context the role and power of Congress in enforcing and protecting rights—both economic and personal. This power traces its lineage to Madison, *The Federalist No. 10* and the Constitutional Convention at Philadelphia in the summer of 1787. As those who frequently attend meetings of The Federalist Society are well aware, one of Madison's unique contributions to the science of politics was to turn the traditional political science of his day on its head. The traditional political science said that representative government would work only in a very small republic and that large empires needed autocratic rule.

Madison believed that the diseases of republican government—populist control, mobocracy, and factions imposing their will on others—could be remedied in the extended republic. His great argument for a national republic was that extensive republics are most favorable to the protection of the public will. If you "[e]xtend the sphere [of government], and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens"²

* Professor of Law, Duke University School of Law.

¹ THE FEDERALIST NO. 10 (James Madison).

² *Id.*

Madison spoke of both economic and noneconomic liberties when he made this central point:

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it³

Madison's precursor to Section 5 of the Fourteenth Amendment, far more vast in nature, was his proposal to the Constitutional Convention that Congress be given a veto over all state laws. The "congressional negative" was Madison's favorite constitutional project. He thought that the populist democracy in the states could be remedied and that protection of economic and noneconomic rights could be secured only by giving an extended national government the authority to veto state laws. For a time, he prevailed in the Convention until the practical difficulties of suspending the operations of state laws, pending approval or rejection by Congress, swung over enough states to narrowly defeat his project.

The consolation prize was the Supremacy Clause, which was offered up by Luther Martin of Maryland and which provided that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby"⁴ Therefore, to the extent that constitutional limits on states exist and to the extent that Congress acts affirmatively, Congress can displace state laws though it has no negative or veto. Madison did not consider this adequate and wrote to Jefferson that the great flaw in the Constitution, the great lack, was the absence of the negative on state laws. The problem was that there were so few constraints placed on state laws in the Constitution, and that the jurisdictional authority of Congress—at a time when our nation did not have an interdependent economy—seemed so

³ *Id.*

⁴ U.S. CONST. art. VI, cl. 2.

slight that no basis existed for rejecting or supplanting the laws of the states through affirmative congressional legislation.

To a large degree, and we don't know whether Madison would have been more or less happy, the Civil War and the Fourteenth Amendment provided, in a sense, a modern national negative on the laws of the states. That development, and the enhancement of the Commerce Clause power through an increasingly interdependent economy, have allowed affirmative congressional legislation to displace state laws. If, as is sometimes suggested, the judicial branch invalidates all actions of Congress empowered under Section 5 of the Fourteenth Amendment, except those in which the Court, acting independently, would have invalidated a state or local law or practice as a violation of Section 1, then the Congress must sit and wait to conform its reading of the great charter of the Fourteenth Amendment to precisely what the courts would have done. This would be an ahistorical and judicially centered view of the roles of courts and of Congress.

The Fourteenth Amendment makes a lot more sense if you read it from the standpoint of the national legislature, which, of course, includes the President in his veto or signing capacity. When you read this amendment from the perspective of a newly appointed member of the judiciary, you open up your controlling guide as a member of the judiciary, and your guide tells you that no state shall abridge or oppose the privileges and immunities of citizens of the United States. Well, the first thing you do is turn to the back of the guide for the appendix—expecting to find many of those privileges and immunities. When you find no appendix, you wonder what kind of job you've been given. Your guide says that no state shall abridge the privileges and immunities of citizenship but provides no list of what those are. The guide also declares that no state shall deprive any person of the equal protection of the laws, nor deprive a person of life, liberty, or property without due process, without telling us what those concepts mean. As an instruction to judges, the controlling guide—the text of the Fourteenth Amendment—seems utterly inadequate.

Read in its proper historical setting, as a charter for the actions of the national Congress to protect rights against local and state infringement, the Fourteenth Amendment makes much more sense as defining the boundaries within which Congress may act itself. Only by historical accident do we have

a judicially centered view of the Constitution. That accident was precipitated by Congress' inaction in the face of what seems, to many if not most Americans today, to be a manifest violation of the provisions of the Fourteenth Amendment—the continuing conduct throughout the first half of this century of a regime of racial segregation and racial subordination by the governments of the South in derogation of the Constitution.

Interestingly enough, the great accounts of *Brown v. Board of Education*⁵ indicate that Justice Jackson was difficult to persuade to join the Court's opinion. When Chief Justice Warren first took Justice Jackson for a walk to tell him that he had five votes and was looking for a unanimous Court, Jackson said that he believed that the Southern system was in conflict with the basic equality command of the Constitution. However, Jackson also believed that the Thirty-Ninth Congress, which proposed the Fourteenth Amendment, intended that Congress itself should make the broad, social, empirical judgment that the Southern system offended that equality command. Justice Jackson believed that it was Congress' role to overturn *Plessy v. Ferguson*,⁶ not the Court's with its more limited capacities to make large social judgments. Jackson was ultimately persuaded that Congress would not act and that the Fourteenth Amendment contains an irreducible, judicially enforceable, self-executing minimum. However, as Gerald Rosenberg has noted, this judicial effort did not reach fruition until Congress itself acted in 1964-65. The system of segregation was really ended only when the national Congress carried out this clearly "Tenth Federalist" vision of a national principle being used to protect individual rights from local oppression. With the Court having acted first in *Brown*, history gives us all the sense that the Court is in the driver's seat.

I agree with Professor Lawson that state conduct violating Section 1 of the Fourteenth Amendment is a necessary jurisdictional predicate for Congress to act under Section 5 of the amendment and that Congress cannot change or alter the meaning of the Constitution. I think that we are close to agreeing as well, however, that what a court has said or done—or what it feels the capacity to do—is not the same

⁵ 347 U.S. 483 (1954).

⁶ 163 U.S. 537 (1896).

thing as "the truth" about Section 1 of the Fourteenth Amendment or any amendment. My meaning may most easily be seen in the case of the Thirteenth Amendment, which abolishes involuntary servitude and which gives Congress the power to enforce the amendment. One could read that enforcement power strongly as allowing Congress to finish the job, root and branch, by eradicating not only the physical holding of persons in servitude but also all of the instances of an entire system of segregation. A court would be faced with an impossible task if asked to decide what aspects of racial practice might constitute this entire system of segregation. That a court would not enjoin or give money damages for a racial practice, such as a denial of equal housing, would not mean that the effect of the Thirteenth Amendment was exhausted if Congress chose to make a legislative judgment about what was and what continued to be a violation of that amendment.

The capacity of Congress to make legislative judgments as an institution places it on a very different footing from that of a court. For example, the simple question at the heart of *Katzenbach v. Morgan*⁷ is whether a group of persons can be so ill-informed about politics and government that it may be properly excluded from exercising the franchise. We might agree that a state may not eliminate persons from voting unless it advances a positive goal for the state, such as intelligent use of the ballot. A state legislature may exclude those literate in Spanish but not literate in English based upon the judgment that those literate in Spanish are not nearly as well-equipped to understand politics and government. That judgment would constitute a valid differentiating basis upon which the state could exclude them from the franchise, and a court may properly defer to that state legislative judgment. Congress is a legislature; consequently, it can exercise its own judgment about the ultimately legislative, social-policy fact assessment that those literate in Spanish are as sufficiently well-informed as are those literate in English and that no legislative governmental electoral goal is in fact advanced. If that is the legislative conclusion of Congress, then the exclusion violates the amendment. This congressional result differs from the

⁷ 384 U.S. 641 (1966).

judicial determination, but I think that each result may be independently defensible.

RESPONSE AND REPLY

MACEY: Let me make a couple of random comments with an eye toward promoting conversation. I want to elaborate for a moment on this idea of rights that I articulated earlier and to suggest that another implication of that framework was to draw a very sharp focus on the tension between democracy and rights. As probably all of you know, Francis Fukuyama has written a blockbuster best seller called *The End of History and the Last Man*, in which he says that liberal democracy has triumphed in the world and that the general consensus is that liberal democracy is the way to go. I think that this is a joining together of two words that have very little in common. The idea of a liberal regime—the first half of the characterization "liberal democracy"—is founded upon the principle of respect for rights, and a liberal is someone who believes in rights with a great deal of flexibility about what constitutes such rights. Of course, democracy is characterized by respect for majoritarian rule. The Framers focused much of their attention on this basic tension between the idea of rights and the idea of democracy.

In my little excerpts from the Federalist Papers, I have circled the exact passage from *The Federalist No. 10* that Walter Dellinger brought to your attention, but I am not going to read it to you again. However, I am going to focus your special attention on a couple of the phrases therein and on the following concerns of Madison. He said that if things don't work out, we might have such terrible things as an abolition of debts. Again, I think that this is clearly an idea that property rights and economic rights were to be protected and that Madison was quite concerned about a wicked project like a movement towards an equal division of property. As I think Professor Dellinger suggested, this respect for economic rights is an idea that is not alien to our constitutional underpinnings.

Finally, let me take two seconds and just say that I think that *The Federalist No. 78*¹ suggests at least a starting point to the inquiry of what role the judiciary should take in the protection of rights. Thank you.

¹ THE FEDERALIST NO. 78 (Alexander Hamilton).

SEITZ: One point that I thought was very interesting in Professor Macey's article was that the way society talks about things can certainly make a difference in the way things actually happen or the way law actually develops. He sees as very hopeful signs the development of The Federalist Society and its very active role in law schools, the appearance of law students and law clerks on both sides of the political spectrum, and the major influence exerted by the manner in which discourse occurs. I think that his observations are very true and are evidenced by the way we briefed the Supreme Court cases that I discussed earlier. In briefing *Yee v. City of Escondido* the AFL-CIO hired an economist to help us to understand and to make arguments that the economic choices made by the legislature in that case were rational choices. Furthermore, we attempted to demonstrate to the Court that it could not make a judgment between one school of economists that thought this was a completely irrational set of regulations, and a second school of economists that could absolutely explain the legitimate public purpose behind this regulation. The Federalist Society has moved the discourse; you have already succeeded on that level.

Let me offer a second example. When we briefed *General Motors Corp. v. Romein*, I did extensive research into the history of the Contract Clause, with specific emphasis on the Framers' intent with respect to that clause and on what constituted a contract at the time that the Contract Clause was framed. Corporations were treated very differently at that time. Corporations were sometimes treated as a privilege granted by the state, and laws passed by the state often were not considered contracts. Therefore, we argued that the legislation in *Romein* was not a contract within the meaning of the Contract Clause. Once again, you have changed the discourse. For some of the reasons that I talked about earlier, I do not necessarily think these changes are good developments. However, I am saying you have already changed the way we talk about things and have changed the dialogue substantially. This influence already constitutes a major change in how these rights are going to be addressed in the future.

LAWSON: I just have two quick comments and then one question for each of the property rights panelists. First, since Professor Raoul Berger is in the audience, I have to say with respect to *Katzenbach v. Morgan* that the real answer, of course,

is that voting is not protected by Section 1 of the Fourteenth Amendment; it is protected by Section 2 of the Fourteenth Amendment, by the Fifteenth Amendment, and possibly by the Guarantee Clause. More generally, those of you who were here yesterday may recall that Charles Rohl from the Center for the Study of Public Choice asked members of a previous panel whether they would select democracy or capitalism if forced to choose between the two. Of course, all the panelists ducked the question, but this panel seems to be much less inclined to duck those kinds of questions. We have heard Jon Macey's answer, and I agree with him entirely.

I have questions for each of the property rights panelists. Jon, I just want to clarify the position that you are taking with respect to economic liberties, which you discussed as an undifferentiated whole. Are you saying that these liberties are in fact protected by the Constitution, that they ought to be protected by the Constitution, or that courts should protect them whether or not they are protected by the Constitution? Virginia, I wonder whether you really can maintain your distinction between property rights and other rights. Even if one grants your premise, as I and others would not, that government defines property rights, can one really distinguish property rights from speech and religion rights? After all, restrictions on fraud are also restrictions on speech, as are restrictions on libel. When we prohibit human sacrifices, we may be restricting religion. If we can have prepolitical conceptions of speech, religion, bodily integrity, and the like that can bind a government, why can't we also have prepolitical conceptions of property that function in the same way?

DELLINGER: Just a quick note to perhaps try to stitch together the two parts of this morning's discussion. While admittedly difficult to imagine in the current political arena, a long term role for Congress in protecting against local oppression of rights could conceivably solve some of the dilemmas that arise from our hesitancy to have the judiciary make these judgments about what is or is not a valid public purpose. I think that Virginia is right to say that the courts may do a better job at means-ends analysis than they do at defining the permissible ends or goals of government. As Richard Stewart, the Assistant Attorney General and sometime professor at Harvard, has stated, the federal government has

truly become, to some extent, "Madison's nightmare."² Madison worried about factionalism that takes over a small geographic area. Along these lines, Richard Stewart points out the extent to which, within this great national government that was supposed to have the broader interests, we now have these slices that have been carved out and defined by a bureaucratic agency, or a congressional subcommittee, or a configuration of special interest groups that control that segment. I think Stewart calls it "a faction-ridden maze of fragmented and often irresponsible micropolitics within the government."³

In the economic as well as in the personal liberty area, one can imagine and hope for a broader congressional role. I recently had occasion to argue against the continuing imposition of extravagant punitive damages awards on a recurring and repeated basis arising out of the same transaction or the same series of transactions. This situation involves cases that are brought in many different state courts. To convince a court in any given state that its state should abstain from granting any more punitive damages in this course of conduct is virtually impossible. The courts know that the money saved by curbing punitive damages awards in their own state—rather than remaining available for people who will become sick in the future—is simply going to go to attorneys and claimants in other states. This area needs a national action either by the judiciary or by Congress. Indeed, Congress has a legislative capacity about which courts may be hesitant to support: To use Cass Sunstein's wonderful phrase, sometimes what you have is a "naked preference"—taking from A and giving to B without actually serving a legitimate public purpose.

QUESTIONS AND ANSWERS

QUESTION: My question is for Professor Macey. Ms. Seitz seemed to indicate that economic rights exist to enable us to better fulfill our noneconomic rights—a functional definition, so to speak, of economic rights. Do you agree with her definition and, if not, what do you see as the purpose of economic rights, and is this purpose or function different from that of noneconomic rights?

² Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335 (1990).

³ *Id.* at 342.

MACEY: No, I don't agree that the purpose of economic rights is to ensure that we can pursue noneconomic rights. However, I do think that economic rights do serve that function. I think that the point was best made by John Stuart Mill when he said that, at the limit, if the government owns everything as a matter of property law, then not all the freedom of the press and popular constitution of the legislature would make this or any other country free otherwise than in name. The idea being conveyed here is that having free realms of economic enterprises gives people the freedom to speak out. However, I think that economic rights do much more than merely facilitate the exercise of noneconomic rights. I think that all rights—freedom of expression, freedom of association, freedom of economic rights—are mechanisms for enabling people to achieve some kind of human flourishing and fulfillment. At the risk of sounding grandiose, I think that rights elevate the human condition, and I think that economic rights not only accomplish this for some people to an equal or to a greater extent than do noneconomic rights, but also accomplish it with less intrusion on others' rights.

QUESTION: I have a question for Professor Lawson. If faced with the choice between democracy and capitalism, you implied just a moment ago that capitalism is your preference. In acknowledging such a preference, how can you properly call yourself a federalist? My interpretation of the Federalist Papers reveals a project of which the main purpose is self-government—a primer in how people can govern themselves and their affairs. Seemingly, the aim of the Federalist Papers is self-government, and economics, though it is a very important aspect of self-governing, is but a means to that aim. If we become capitalists instead of republicans, then are we still disciples of James Madison?

LAWSON: You pose a very fair question that I think has a very fair answer. I was present at the founding of The Federalist Society, and the other founders can testify that I was ardently, stridently opposed to the name "The Federalist Society." My original choice was the "Society for Spontaneous Order." To the great benefit of posterity, I lost.

RESPONSE: I appreciate your candor, but I think we should be frank about that.

LAWSON: I agree.

QUESTION: I have a question for Ms. Seitz. You admitted that you do see a need for economic rights in order to exercise noneconomic rights. You then went on to say that justification exists for some sort of redistribution of wealth scheme in order to allow the unfortunates to exercise these noneconomic rights. I assume that this redistribution of wealth would require an increase in my taxes, which then might decrease my opportunity to come to this forum to engage in this discourse. Apparently, you are somehow willing to decrease the rights of some in order to increase the rights of others. I wonder if you see noneconomic rights as some sort of zero-sum gain or as infinitely expandable. In other words, you will give my resources to someone who does not have such resources so that person can buy more books and have better freedom of speech. However, as a result, you are taking away my opportunity to come here if I am unable to afford it.

SEITZ: Of course, I was assuming that some level of economic rights—some ability to accumulate property or some accumulation of property—was necessary to any kind of effective exercising of noneconomic rights. I was accepting that as a premise. If my premise is true and if we want to create what I would think of as the optimal nation, we have to ensure not just that some minimal number of people can effectively exercise their noneconomic rights but rather that all people are actually exercising their rights effectively. Redistribution might somehow be justified under such a condition. If you do not believe that this condition justifies redistribution, then you would believe in the legitimacy of allowing some group of people to have the ability to effectively exercise their noneconomic rights and for another group to have no such ability. I understand that a choice would have to be made here.

RESPONSE: However, by the same token, you are coming out and saying that you are willing to diminish the rights of those from whom you take the resources.

SEITZ: Absolutely. Though, of course, I do not see economic rights as the kind of undivided whole in which every cent you

have is your right. I certainly do not see economic rights that way.

QUESTION: My question is directed to Ms. Seitz. I do not feel that your theories are close to reality, specifically with reference to contract law. In the Northeast, specifically New Jersey, someone suing in court under contract law to collect a debt must go into mediation. From my past experience, no matter how much money is owed to you under a contract, the mediator slashes the amount owed in half. Additionally, many judges are being pulled away from civil law and are hearing criminal cases because of the drug situation. In light of these facts, how can your theory on contract law remain justified? Possibly, I misunderstand your position.

SEITZ: I don't believe that I was necessarily espousing the position that agreements legitimately made should not be enforced. With respect to the Contract Clause, I did mention that in *General Motors Corp. v. Romein* we argued that the contract at issue between the UAW and General Motors went beyond any notion of a contract as embodied in the Contract Clause. That argument may or may not be controversial here. I think that maybe we had a miscommunication.

QUESTION: My question is for Professor Lawson. Unfortunately, I have not really read the Fourteenth or the Fifteenth Amendments since law school because neither comes up very frequently in my practice. One possible argument in favor of the Court in *Katzenbach v. Morgan*, assuming that voting is incorporated in the Fourteenth Amendment, is that Congress was not necessarily making a legal interpretation with respect to the questions of admissibility and sufficiency of evidence but rather was involved in making determinations as to the actual social facts of the situation. One might argue that courts are competent only to determine facts specific to a particular controversy or case between two individuals and that the courts must retreat when the questions to be answered involve facts about society as a whole. Such broad policy determinations are within the special competence of the legislature and are not interpretations of the law in the conventional sense. What is your reaction to this type of argument?

LAWSON: I don't buy this argument because of my substantive conception of what Section 1 of the Fourteenth Amendment means. I think that the Equal Protection, Privileges and Immunities, and Due Process Clauses, which seem cryptic at first glance, actually have quite specific and determinant meanings, and their meanings do not depend on such things as social facts. You do not need factfinding of a policymaking variety in order to tell whether a state practice does or does not constitute a violation of Section 1. If you did need such factfinding, then I think that the question would be very interesting. In that case, I think that the legal interpretation itself might depend in some way on institutional roles; the way that a legislature would interpret might be different from the way a court would interpret. I can't accept this approach simply because I think that determinant rules are laid down in the Fourteenth Amendment; an action either violates these rules or it does not.

RESPONSE: Even in the clearest case, you will have mixed questions of fact and law. If the case is a question of a particular social practice or a particular practice endorsed or codified in the law, then couldn't one still argue, regardless of the clarity of the interpretation of the Fourteenth Amendment, that a mixed question of law and fact exists and that Congress may have a larger role in determining the answer to that question? I believe that this argument would be especially applicable to a case concerning voting rights and voter qualification criteria.

LAWSON: An action violates the Fourteenth Amendment not because of its effects but because of the nature of the action. As John Harrison would put it, the Fourteenth Amendment is a formal "rule about rules." The only tricky case is a state rule or practice that is deliberately crafted in such a way that it evades a constitutional stricture. For example, the Fifteenth Amendment clearly prohibits state rules that restrict voting on account of race. Suppose that, immediately after Reconstruction, a state had adopted a rule saying that anyone could vote whose grandfather voted. On its face, this restriction is not race-based; however, the true intent of the restriction is quite obvious. In this kind of circumstance, maybe different roles exist for courts and for legislatures, but, in other circumstanc-

es, I do not think so. The only way that I could convince you not to think that way would be to go through the substantive provisions and to show you that the way you determine whether something violates the Fourteenth Amendment does not depend on that kind of factfinding, and such an undertaking is very nasty.

QUESTION: I have a question for Professor Macey. It is hard to be against rights, particularly economic rights, but I am wondering exactly where we would find these rights. Who is going to decide for us what these rights are? If you conclude that the legislature should describe these rights, then I have a question for Professor Dellinger. Do the courts have a function to limit the legislature and its tyranny of the majority in the description of economic rights, and where would the courts look to define which rights are constitutional and which rights are unconstitutional?

MACEY: I think that the question posed to me is a very close cousin to the question that Gary Lawson put to me at the end of his remarks. What is the source of economic rights, and who protects them? As far as sources go, I believe that these economic rights are prepolitical, just as I believe that the noneconomic rights of assembly and expression, among others, are prepolitical—certainly, in the American context, prepolitical in the sense that these rights clearly existed as a matter of philosophy and ideas prior to the framing. Additionally and more importantly, as I suggested in my incantation from *The Federalist No. 10*, I think that the federalists believed that these rights were going to be protected within the governmental scheme that they designed. The Framers intended that these economic rights would be protected structurally. One of the consequences of my reading of rights or of my belief that these economic rights ought to be protected is that, at least since 1937, something has gone wrong. Either the Framers screwed up, or I am wrong in my reading because these rights presently are not being protected, and this fact really gets to the gist of your question about who protects economic rights. My answer is that the Framers thought that these rights were going to be protected structurally. As described in the part of *The Federalist No. 10* that Professor Dellinger read, voting, bicamerality, and a variety of

other aspects of the Constitution were going to protect these rights. To date, these structural devices have not protected economic rights. So, what do we do? Basically, I think that everything is up for grabs based on *The Federalist No. 78*, my own view of how the constitutional structure works, and my own beliefs about the way that the judicial system works. I think that courts ought to protect economic rights because obviously Congress is not doing so. Additionally, I think that we should invoke an incremental, common law methodology. I do not think that a ritualistic formula, whereby you plug in your legal question at one end and the answer in every instance comes out the other end, will effectively address the problem. I believe that a long process of rebuilding the jurisprudence that had been developed up to 1937 will be necessary.

DELLINGER: Courts have a role in protecting individual rights, even if the Court determines that the congressional judgment is reasonable and defers to that congressional judgment and even where the Court itself would not have set aside a contrary state legislative judgment. For example, were the Court persuaded by Professor Raoul Berger's view that Section 1 of the Fourteenth Amendment did not cover voting rights, of course the Court would invalidate an act of Congress, predicated on the Fourteenth Amendment, setting aside New York's franchise limitation. If Congress were to pass a freedom of reproductive choice act invalidating, on a variety of different theories, state restrictions on abortion and if Congress included a provision that compelled physicians or nurses to participate in those procedures against their religious beliefs or consciences, then, in my view, that provision would be unconstitutional, and the Court would strike it down. In 1956, if Congress had held that a system of rigid, state-imposed racial segregation involved no assertion of inferiority, then I believe that Congress would have been making a judgment about social facts that had no reasonable basis. Such a judgment could properly be struck down by the Court.

EASTERBROOK: Let me interject briefly. Part of the answer that Professor Macey gave explains why he began his talk by quoting, without complete approval I gather, from an article

that I wrote called *The Constitution of Business*.¹ Professor Macey says that property rights are prepolitical and that courts should enforce them whether or not they are present in the Constitution. His belief follows from the conclusion that the Founders screwed it all up.

I am much more doubtful that the Founders blundered through ignorance. Madison did not consider the power of minority faction, but he was worried about majority faction. Minority faction garnered great power in the United States as a result of changes that were not possible to anticipate in 1787—the dramatic decrease in the cost of transportation and the advances in communication which, at last, made this large nation an integrated whole. These changes have made the United States much more like a state was 200 years ago, in the sense that people can communicate and trade readily with one another. Change is not mistake. Fundamental social change has consequences for the organization of government.

The jurisprudential issue, then, is what judges may do about these consequences. Professor Macey and I have a large disagreement. You would think that The Federalist Society, which has insisted that Congress and the President be able to justify their own behavior, would demand that judges also turn to an affirmative source of authority for particular behavior. Because judges are governmental regulators, just like everybody else, whence comes their authority to regulate?² If you look around for the authority to regulate and no authority is to be found, then the person claiming to act in the name of the state should desist. We are left with democracy—political solutions to today's problems. This realization is at the core of a lot of the discussion and disagreement here.

¹ Frank H. Easterbrook, *The Constitution of Business*, GEO. MASON U. L. REV., Winter 1988, at 53.

² See Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 371-80 (1992).